Supreme Court, U.S.
FILED

961469 MAR 17 1997

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

HERNAN RAMIREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ALAN JENKINS
Assistant to the Solicitor General
J. DOUGLAS WILSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

75 pp

QUESTION PRESENTED

Whether police officers must possess more specific evidence of danger to themselves or others in order to justify a no-knock entry in which they damage a door or window than would be required to justify a no-knock entry made without damage to property.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
Reasons for granting the petition	9
Conclusion	22
Appendix A	1a
Appendix B	28a
Appendix C	37a
Appendix D	42a
Appendix E	48a

TABLE OF AUTHORITIES

Cases:

Bodine v. *Warwick*, 72 F.3d 393 (3d Cir. 1995)	19
Buckley v. *Beaulieu*, 104 Me. 56 (1908)	14
Chimel v. *California*, 395 U.S. 752 (1969)	16
Dalia v. *United States*, 441 U.S. 238 (1979)	12
Graham v. *Connor*, 490 U.S. 386 (1989)	14
Illinois v. *Gates*, 462 U.S. 213 (1983)	17
Illinois v. *Rodriguez*, 497 U.S. 177 (1990)	17
Ker v. *California*, 374 U.S. 23 (1963)	17
Maryland v. *Buie*, 494 U.S. 325 (1990)	15
Maryland v. *Garrison*, 480 U.S. 79 (1987)	14
Maryland v. *Wilson*, No. 95-1268 (Feb. 19, 1997)	15
Michigan v. *Long*, 463 U.S. 1032 (1983)	15
Michigan v. *Summers*, 452 U.S. 692 (1981)	13, 15
Payton v. *New York*, 445 U.S. 573 (1980)	18
Pennsylvania v. *Mimms*, 434 U.S. 106 (1977)	15
Read v. *Case*, 4 Conn. 166 (1822)	11
Sabbath v. *United States*, 391 U.S. 585 (1968)	10, 11
Terry v. *Ohio*, 392 U.S. 1 (1968)	16

Cases—Continued: Page

United States v. *Becker*, 23 F.3d 1537 (9th Cir. 1994) 6, 7, 12, 14, 19
United States v. *Brown*, 52 F.3d 415 (2d Cir. 1995), cert. denied, 116 S. Ct. 754 (1996) 20
United States v. *Dahlman*, 13 F.3d 1391 (10th Cir. 1993), cert. denied, 511 U.S. 1045 (1994) .. 19-20, 21
United States v. *Gordils*, 982 F.2d 64 (2d Cir. 1992), cert. denied, 507 U.S. 1054 (1993) 20
United States v. *Kemp*, 12 F.3d 1140 (D.C. Cir. 1994) 10, 13
United States v. *Kennedy*, 32 F.3d 876 (4th Cir. 1994), cert. denied, 115 S. Ct. 939 (1995) 19
United States v. *Lalor*, 996 F.2d 1578 (4th Cir.), cert. denied, 510 U.S. 983 (1993) 19
United States v. *Maden*, 64 F.3d 1505 (10th Cir. 1995) 20
United States v. *McConney*, 728 F.2d 1195 (9th Cir.), cert. denied, 469 U.S. 824 (1984) 12
United States v. *Spinelli*, 848 F.2d 26 (2d Cir. 1988) 20
United States v. *Stewart*, 867 F.2d 581 (10th Cir. 1989) 20
United States v. *Stowe*, 100 F.3d 494 (7th Cir. 1996), petition for cert. pending, No. 96-7439 20
United States v. *Whitney*, 633 F.2d 902 (9th Cir. 1980), cert. denied, 450 U.S. 1004 (1981) 14
Vale v. *Louisiana*, 399 U.S. 30 (1970) 18
Wilson v. *Arkansas*, 115 S. Ct. 1914 (1995) 8, 10, 11, 12, 19
Ybarra v. *Illinois*, 444 U.S. 85 (1979) 18

Constitution and statutes:

U.S. Const. Amend. IV 2, 5, 11, 13, 15, 16, 18
18 U.S.C. 922(g)(1) 2, 5
18 U.S.C. 3109 ..... 2, 5, 10, 11, 16, 18

Miscellaneous: Page

2 Wayne R. LaFave, *Search and Seizure* (3d ed. 1996) 10, 13

In the Supreme Court of the United States

OCTOBER TERM, 1996

No.

UNITED STATES OF AMERICA, PETITIONER

v.

HERNAN RAMIREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is reported at 91 F.3d 1297. The opinion of the district court (App., *infra*, 28a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1996. A petition for rehearing was denied on November 15, 1996 (App., *infra*, 48a). On February 4, 1997, Justice O'Connor extended the time for filing a petition until March 15, 1997 (a Saturday). The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 3109 of Title 18 of the United States Code provides:

> **Breaking doors or windows for entry or exit**
>
> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

STATEMENT

A grand jury in the District of Oregon returned an indictment charging respondent with possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). Respondent moved to suppress evidence obtained during a search of his residence, including the two firearms that formed the basis for the offense charged in the indictment. The district court granted

the motion. App., *infra*, 28a-36a. The court of appeals affirmed. *Id.* at 1a-27a.

1. On November 2, 1994, while en route to testify at a state criminal trial, federal inmate Alan Lawrence Shelby slipped out of his handcuffs, assaulted a deputy sheriff, and escaped from custody. At the time, Shelby was serving concurrent sentences for federal drug and firearms violations, and for a state armed robbery conviction. App., *infra*, 2a, 32a-33a. On November 4, 1994, Deputy U.S. Marshal Wayne Kauffmann applied for a warrant to search respondent's residence in Boring, Oregon, for Shelby. *Id.* at 41a. The affidavit in support of the warrant application recounted that a reliable confidential informant had seen a person believed to be Shelby at respondent's residence. The person had been introduced to the informant as "Alan," and had stated in the informant's presence, "I had to knock out a guard." *Id.* at 39a. According to the affidavit, after receiving that information, the informant and an agent with the Bureau of Alcohol, Tobacco, and Firearms had driven past respondent's residence and seen a man "who they believed to be Alan Shelby outside the residence." *Id.* at 39a-40a. Deputy Marshal Kauffmann's affidavit further stated that he had then driven to respondent's residence and seen someone who, Kauffmann believed, was the same person seen by the ATF agent. *Id.* at 40a.

The affidavit also described the basis for Deputy Marshal Kauffmann's belief that "Shelby is an extreme danger to law enforcement officers." App., *infra*, 41a. In particular, it stated that Shelby had previously been convicted of conspiracy to manufacture methamphetamine, possession of methamphetamine with intent to distribute it, and using or

carrying a firearm during and in relation to a drug trafficking offense; that Shelby "had a history of violent escapes"; and that Shelby had stated that he would not "do federal time." *Id.* at 38a.

According to the affidavit, in 1991 Shelby had attempted to escape from custody "by striking a corrections officer in the face and kicking out the door of the jail. Shelby ran from the jail and assaulted a woman in a parking lot and stole her vehicle. During the escape attempt, Shelby rammed a police vehicle with the stolen vehicle." App., *infra*, 38a. The affidavit further stated that Shelby "has made threats to kill witnesses and police officers associated with his incarceration" and that he "has brutally tortured others in the past with a hammer." *Id.* at 38a-39a. Finally, the affidavit stated that Shelby "has had access to large caches of weapons." *Id.* at 39a. See also *id.* at 33a.

Based on the information in the affidavit, a magistrate judge issued a warrant to search respondent's residence for Shelby. The warrant expressly provided that, "because of exigent circumstances shown in the application, you are authorized to enter the premises without complying with the Knock-and-Announce requirement." C.A. E.R. 27.

Before they executed the warrant, officers learned from the informant that respondent Ramirez "was possibly involved in drugs, which he kept in the garage," and that "there were supposed to be several guns in [respondent's] garage." App., *infra*, 3a, 33a, 43a-44a. On November 5, 1994, at about 6:15 a.m., approximately 45 law enforcement officers surrounded respondent's house. Using a loudspeaker, a police officer announced the officers' presence and ordered the occupants of the dwelling to come out. At the

same time, a police officer broke open the window of the garage attached to the house, while another officer shouted "Sheriff's Office, Search Warrant." *Id.* at 3a-4a, 29a, 44a.

Awakened by the police activity, respondent initially thought that his house was being burglarized. He ran to a closet, obtained a gun, and fired it into the ceiling. A short time later, respondent realized that the police had surrounded the house, and he surrendered. After receiving and waiving his *Miranda* rights, respondent admitted that he was a convicted felon and that he owned the gun that he had fired, as well as another firearm. Respondent further admitted that a man resembling Shelby had been at his house two days earlier. Based on respondent's statement, and the officers' observation of the gun respondent had fired, the officers obtained a second search warrant and seized the two firearms. App., *infra*, 4a, 29a, 45a-46a.

2. Respondent was charged with possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). He moved to suppress the firearms seized from his house, and the district court granted the motion. App., *infra*, 28a-36a. The court found that the warrant to search respondent's house for Shelby was supported by probable cause. *Id.* at 30a-31a. It concluded, however, that the officers had violated the federal knock-and-announce statute, 18 U.S.C. 3109, and the Fourth Amendment because their reasons for making an unannounced entry were insufficient to justify breaking the window of Ramirez's garage as they announced their presence. App., *infra*, 31a-35a.

The court stated that, under Ninth Circuit precedent, "mild exigency, such as knowledge that a person is dangerous, can justify an immediate entry that is

done without physical destruction of property," but an "entry that is accomplished by physical destruction of property [requires] more specific inferences of exigency." App., *infra*, 32a (citing *United States* v. *Becker*, 23 F.3d 1537, 1540-1541 (9th Cir. 1994)). The court acknowledged that "there were specific facts known regarding Shelby's propensity to attempt escape, his disdain for federal incarceration, and his past willingness to use threats and violence as a means of intimidation." *Id.* at 34a. Those facts, the court concluded, presented "sufficient exigent circumstances to have allowed immediate entry into [respondent's] residence where entry could be obtained without physical destruction of property." *Id.* at 33a.

The court held, however, that the government had not demonstrated sufficient exigency to justify breaking respondent's window during the search because "there was no information that [Shelby] was armed and dangerous at [respondent's] home, or that he would present any specific dangers to arresting officers if found there." App., *infra*, 34a. In the court's view, the officers' decision to break a garage window in the course of serving the warrant, "although prompted by a knowledge of Shelby's past, was not sufficiently supported by circumstances suggesting that the fugitive posed a particular danger to others during this attempted apprehension." *Id.* at 34a-35a. Because it concluded that the bases for the second search warrant, and the subsequent seizure of respondent's firearms, were "direct consequences of the manner in which the first warrant was executed," the court ordered that the weapons be suppressed. *Id.* at 35a.

3. A divided panel of the court of appeals affirmed. App., *infra*, 1a-27a. The majority stated that "exigent

circumstances can justify breaking into a house without notice." *Id.* at 8a. It further stated, however, that, "[w]hen exigency is claimed, we must determine what kind of exigency it was." *Ibid.*

Like the district court, the majority employed the two-tiered analysis required by circuit precedent. It explained that, while "even a mild exigency, like knowledge that a person is dangerous, can justify immediate entry where that can be done without any physical disruption of property," App., *infra*, 8a (quoting *Becker*, 23 F.3d at 1540), "[m]ore specific inferences of exigency are necessary" where the destruction of property is involved, *ibid.* (quoting *Becker*, 23 F.3d at 1541).

Applying that test, the majority held that a sufficient level of exigency had not been shown here:

> The 45 officers did not fear any of the actual residents of the house and were not attacking a gang or cult hangout where they might be met by a fusillade of gunfire. They were concerned about one person, Shelby, who might be on the premises. But Shelby was not known to have ever shot or shot at anyone. He was an escape artist, who said he would not go to federal prison. He had knocked people down in his escape attempts, and he had stolen a car and run into a police vehicle. His violence towards law enforcement had not extended beyond that, even though he had obviously been arrested on some occasions. Perhaps his degree of dangerousness bespoke a mild exigency. Certainly it did not bespeak more.

App., *infra*, 9a. Because it found that the government had failed to adduce "specific evidence that Shelby was armed, that he would use firearms against the

officers, or that when he was faced with [a] show of force he would do anything violent at all," *id.* at 11a-12a, the court concluded that respondent's "statutory and Fourth Amendment rights were violated when government agents broke into his home in the early morning hours without complying with the knock-and-announce requirements," *id.* at 17a.[1]

Judge Kozinski dissented. App., *infra*, 18a-27a. He argued that "[t]he record contradicts the majority's romantic description of Shelby," who was, in Judge Kozinski's view, "a hardened and desperate criminal." *Id.* at 18a. Judge Kozinski emphasized that the officers knew that Shelby had "a history of violent escapes," had "[a]ssault[ed] helpless civilians" and law enforcement officers in effecting those escapes, and had engaged in "brutal[] tortur[e]." *Id.* at 19a-20a. The dissent further observed that officers had specific information about Shelby's access to firearms. *Id.* at 20a. Based on those facts, the dissent argued that the officers had "properly balanced the homeowner's privacy and property interests against the dictates of security." *Id.* at 23a-24a (citing *Wilson* v. *Arkansas*, 115 S. Ct. 1914, 1918 (1995)).[2]

---

[1] The majority further concluded that the "seizure of the guns * * * came as the most direct, if not the only, result of the" police "break-in," and that "suppression would serve to dissuade the police from this kind of unnecessary invasion of people's homes." App., *infra*, 13a.

[2] Judge Kozinski also dissented on the ground that, "[e]ven had the no-knock search been illegal, this would provide no grounds for suppression of the evidence pertaining to [respondent]." App., *infra*, 24a.

REASONS FOR GRANTING THE PETITION

The court of appeals did not doubt that the officers who executed the search warrant in this case reasonably believed that providing advance notice of their presence and purpose would have increased the risk of danger they faced in seeking to apprehend an escaped fugitive who had a history of violent acts. In concluding that the immediate entry to execute the warrant was illegal, however, the court of appeals employed a two-tiered analysis focusing on property damage. Under the court's test, when officers break property to effect a no-knock entry, that action significantly elevates the showing of potential harm required to justify the entry. Applying that test here, even the minor damage to property involved in this case (breaking a garage window) imposed on the officers the need to have "[m]ore specific inferences of exigency" (App., *infra*, 8a) than the evidence that the officers had: that a person sought within the house was an escaped fugitive with a prior history of violence.

The Ninth Circuit's two-tiered approach to no-knock entries is incorrect, because it erroneously makes property damage the determinant of how specifically officers must be able to infer a risk of danger before they may make a no-knock entry. The question whether officers may make an unannounced, no-knock entry should turn instead on whether the officers reasonably believe that giving prior notice of their presence and purpose, and providing a grace period for occupants to open the door, would expose the officers to a risk of danger, would facilitate a fugitive's escape, or would likely prompt the destruction of evidence. The Ninth Circuit's bifurcated

approach is also unique. In no other circuit would the government face an increased burden to justify a no-knock entry simply because property damage occurred in the course of the entry. Because the Ninth Circuit's approach is wrong, conflicts with the approach employed in other circuits, and threatens to jeopardize the safety of law enforcement officers in the dangerous task of executing warrants, review by this Court is warranted.

1. a. In *Wilson* v. *Arkansas*, 115 S. Ct. 1914 (1995), this Court held that the common-law knock-and-announce principle is "an element of the reasonableness inquiry under the Fourth Amendment," such that "in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment." *Id.* at 1918. One of the interests that underlie the knock-and-announce principle is the avoidance of damage to property. See *id.* at 1918-1919; *United States* v. *Kemp*, 12 F.3d 1140, 1142 (D.C. Cir. 1994); 2 Wayne R. LaFave, *Search and Seizure* § 4.8(a), at 599 (3d ed. 1996). But the more fundamental interest protected by the announcement principle is the avoidance of unnecessary surprise to the occupants of a dwelling that is about to undergo a warrant-authorized search. As the Court held in *Sabbath* v. *United States*, 391 U.S. 585 (1968), the use of "force" in effecting an unannounced entry is not necessary to trigger the federal knock-and-announce provision, 18 U.S.C. 3109. Although Section 3109 uses the phrase "break open," the Court explained that "[a]n unannounced intrusion into a dwelling—what § 3109 basically proscribes—is no less an unannounced intrusion whether officers break down a door, force open a chain lock on a partially open door, open a locked door by use of a passkey, or * * * open

a closed but unlocked door." 391 U.S. at 590; see also *ibid.* ("The protection afforded by, and the values inherent in, § 3109 must be governed by something more than the fortuitous circumstance of an unlocked door.") (internal quotation marks omitted).[3]

While recognizing the knock-and-announce principle, the Court in *Wilson* also emphasized that the Fourth Amendment's "flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." 115 S. Ct. at 1918. Without delineating "a comprehensive catalog" of the factors that could overcome the "presumption in favor of announcement," *id.* at 1918-1919, the Court noted, by way of example, that an unannounced entry may be justified "under circumstances presenting a threat of physical violence," *ibid.*, "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given," *id.* at 1919, and "where a prisoner escapes * * * and retreats to his dwelling." *Ibid.* (citing *Read* v. *Case*, 4 Conn. 166, 170 (1822) (plaintiff who "had resolved * * * to resist even to the shedding of blood * * * was not within the reason and spirit of the rule requiring notice")).

b. The court of appeals in this case applied its long-standing rule that, when officers enter to execute a warrant without a prior announcement, the specificity of their knowledge of the potential dangers

---

[3] Although *Sabbath* involved Section 3109, both that provision and the Fourth Amendment incorporate the common-law announcement principle—and the acknowledged grounds for dispensing with a prior announcement. See *Wilson*, 115 S. Ct. at 1918 n.3 (noting that in *Sabbath*, 391 U.S. at 591 n.8, the Court suggested that both the "'common law' rule of announcement and entry and its 'exceptions' were codified in § 3109").

resulting from a prior announcement must be greater if the unannounced entry entails even minor "physical disruption of property." App., *infra*, 8a (quoting *United States* v. *Becker*, 23 F.3d 1537, 1540 (9th Cir. 1994)). See also *United States* v. *McConney*, 728 F.2d 1195, 1206 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984). Under that approach, where property damage occurs during a no-knock entry to execute a warrant, officers must demonstrate "[m]ore specific inferences of exigency" (App., *infra*, 8a) than the serious risk of harm to officers and others that existed in this case.

The Ninth Circuit's approach is incorrect. As the Court recognized in *Wilson*, an unannounced, no-knock entry may be justified by the valid law enforcement interests that exist when officers reasonably believe that advance notice might increase the risk of harm to officers or frustrate the purpose of the search. 115 S. Ct. at 1918-1919. The need to damage property in making an unannounced entry has no bearing on whether those law enforcement interests are present. When the requisite peril to officers exists, or there are other risks that make it reasonable for officers to employ the element of surprise, it should not matter whether the fortuity of an unlocked door or open window enables officers to execute an unannounced entry without breaking property, or, as is more common, the physical characteristics of the doors and windows make it necessary for officers to break property to enter. Cf. *Dalia* v. *United States*, 441 U.S. 238, 257 n.19 (1979) ("[O]ften it is impossible to anticipate when [it] will be necessary" for officers to engage in "forceful breaking and entering * * * to effect a warranted search."). In either situation, the justification for the immediate entry is the need for

surprise; that need does not diminish simply because minor property damage may be necessary.

Indeed, the breaking of a window may be a means to distract the occupants and thereby greatly increase the officers' ability to gain quick control of the situation. By drawing the occupants' attention to the sound of breaking glass, officers may be able to divert the occupants into less threatening positions and thereby reduce the risk of violence. Cf. *Michigan* v. *Summers*, 452 U.S. 692, 702-703 (1981) ("The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation."). Thus, the question whether an unannounced entry is justified should turn on whether law enforcement interests would be jeopardized by giving advance warning, not on whether property is damaged during the entry. And where "knowledge that a person is dangerous" (App., *infra*, 8a) would justify unannounced entry through an open door or window, no greater or more specific showing should be required merely because a locked door or window makes a degree of property damage necessary to safe execution of the warrant.

That is not to say that destruction of property has no place in analyzing the reasonableness of the entry. Excessive or wholly unnecessary destruction of property by law enforcement officers in the execution of a warrant may violate the Fourth Amendment's reasonableness standard, whether or not officers knock and announce before entry. See 2 LaFave, *Search and Seizure* § 4.10(d), at 673-674 (describing "the long-standing requirement[] that the officers * * * avoid *unnecessary* damage to the premises") (emphasis added); *Kemp*, 12 F.3d at 1142 (interests advanced by statutory knock-and-announce requirement include

"preventing *needless* destruction of private property") (emphasis added); *Buckley* v. *Beaulieu*, 104 Me. 56, 61 (1908) (where officers unnecessarily destroyed walls of suspect's home, "the manner and extent of the search in this case were unreasonable and in excess of the officers' authority"); cf. *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987) (examining "reasonableness of the manner in which [a search warrant] was executed"). Thus, even when an unannounced entry is justified to protect the officers' safety or to foil an escape, the no-knock entry must still be carried out in a reasonable manner, involving a proportionate amount of force. Just as officers may not use excessive force in making an otherwise valid probable-cause arrest, see *Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989), they may not destroy property unnecessarily in making an otherwise-valid unannounced entry.

In contrast to that approach, the test employed by the court of appeals makes property damage relevant to whether an unannounced entry is justified at all. Under the Ninth Circuit's two-tiered inquiry, the breaking of *any* property automatically increases the burden on the officers to possess "more specific inferences" of danger or other harms that warrant an unannounced entry. The court of appeals has suggested that such inferences would include proof that "evidence was being destroyed," *United States* v. *Whitney*, 633 F.2d 902, 910 (1980), cert. denied, 450 U.S. 1004 (1981), or "specific information that [a dwelling's resident] was armed or dangerous," *Becker*, 23 F.3d at 1541. Because such specific inferences are ordinarily unavailable to officers, the court of appeals' rule would require officers to forgo unannounced entries to execute search warrants, even where the available

facts strongly support the use of surprise to reduce risks to officers or secure the objects of the search.[4]

The degree of certainty expected by the court of appeals not only is unrealistic, but is inconsistent with the degree of deference that this Court affords police officers' contemporaneous assessment of the risk of violence they face. The Court has frequently noted the "weighty interest in officer safety," *Maryland* v. *Wilson*, No. 95-1268 (Feb. 19, 1997), slip op. 4, and, in recognition of that interest, has never required absolute assurance that a particular situation would threaten officers' safety in order to justify a measured intrusion on Fourth Amendment interests. See, *e.g.*, *Maryland* v. *Buie*, 494 U.S. 325, 336 (1990) ("protective sweep" of house justifiable based on "reasonable suspicion of danger"); *Michigan* v. *Long*, 463 U.S. 1032, 1049 (1983) ("protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger"); *Michigan* v. *Summers*, 452 U.S. at 702-703 ("interest in minimizing the risk of harm to the officers" justifies detaining occupant of premises while search is conducted); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 110 (1977) (per curiam) (relying on "inordinate risk confronting an officer" to justify requirement that

---

[4] The burdens placed on law enforcement officers by the "specific inferences" test are well demonstrated by this case. Here, although the escaped-fugitive Shelby had previously struck a corrections officer in the face to effect an escape, had stolen a car and rammed it into a law enforcement vehicle, had threatened to kill witnesses, had tortured another person with a hammer, had vowed not to serve federal time, and had access to weapons, the court of appeals surmised that "[p]erhaps" Shelby's "degree of dangerousness bespoke a mild exigency. Certainly it did not bespeak more." App., *infra*, 9a.

driver exit car in a traffic stop); *Chimel* v. *California*, 395 U.S. 752, 763 (1969) (search incident to arrest justified on ground that, without search, "officer's safety might well be endangered"). The "specific inferences" required by the court of appeals would expose officers to heightened risks in the particularly dangerous setting of warrant execution, contrary to the consistent view of this Court that "[c]ertainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Terry* v. *Ohio*, 392 U.S. 1, 23 (1968).

c. Under a proper analysis, the entry in this case complied with the Fourth Amendment and Section 3109. The warrant to search respondent's property was based on probable cause to believe that Shelby was hiding there. App., *infra*, 30a-31a.[5] In addition, the officers executing the warrant had reliable information that (1) Shelby had been convicted of a number of felonies, including using or carrying a firearm during and in relation to a drug trafficking offense; (2) Shelby "had a history of violent escapes," and had stated that he would not "do federal time"; (3) Shelby had attacked officers and innocent bystanders in past escape attempts; (4) Shelby "ha[d] made threats to kill witnesses and police officers associated with his incarceration"; (5) Shelby "has had access to large caches of weapons"; (6) respondent Ramirez "was possibly involved in drugs, which he kept in the garage"; and (7) "there were supposed to be several guns in [respondent's] garage." *Id.* at 32a-33a, 38a-

[5] The court of appeals expressed some doubt about that proposition, but it decided this case on the assumption that probable cause was established. App., *infra*, 12a n.1.

39a, 43a-44a. Based on that knowledge, the officers had ample reason to conclude that a risk of violence would arise if they announced their presence before entry, and that making an unannounced entry would significantly reduce that risk. The officers were therefore justified in making a no-knock entry, whether or not the manner of entry required some damage to property.[6]

Not only was the unannounced entry justified, but the damage to respondent's property was neither gratuitous nor excessive. Rather, the minimal step of breaking the window to respondent's garage simultaneously with announcement and entry was a reasonable way both to obtain entry and to draw the occupants to a position away from the doors, and thereby facilitate the officers' ability to control the search scene. Accordingly, the manner of entry in this case was lawful.[7]

[6] The fact that the officers did not find Shelby does not undercut the reasonableness of their actions at the time. "It goes without saying that in determining the lawfulness of entry * * * we may concern ourselves only with what the officers had reason to believe *at the time of their entry*." *Ker* v. *California*, 374 U.S. 23, 40 n.12 (1963) (plurality opinion); cf. *Illinois* v. *Rodriguez*, 497 U.S. 177, 186 (1990).

[7] Even if the Court were to disagree with the above analysis, which considers, first, whether law enforcement interests justified dispensing with an announcement before entry and, second, whether any breakage of property during the entry was excessive under the circumstances, the Court should still reject the Ninth Circuit's two-tiered approach. At most, property damage should be one factor in considering the overall reasonableness of an unannounced entry. It should not function as a switch that greatly elevates the justifications needed to dispense with a prior announcement. Cf. *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983). Under such an analysis, the minor

2. No other court of appeals employs the Ninth Circuit's two-tiered approach or requires a heightened showing of justification for unannounced searches that involve damage to property. Rather, other courts of appeals have inquired whether an immediate entry was justified by the circumstances, without adverting to officers' need to cause property damage. In applying that analysis, other courts of appeals have upheld forcible, unannounced entries based on equal or lesser showings of justification than existed here.[8]

---

amount of property damage in this case would not be a basis for finding the unannounced entry to be unlawful.

[8] Most federal courts of appeals have stated that "exigent circumstances" may justify dispensing with a prior announcement under either the Fourth Amendment or Section 3109. The reference to "exigent circumstances," however, can cause confusion. "Exigent circumstances" is the phrase used to describe the justification needed to dispense with a warrant altogether before entering a dwelling. See *Payton* v. *New York*, 445 U.S. 573, 585-586 (1980); *Vale* v. *Louisiana*, 399 U.S. 30, 34-35 (1970). In the context of an unannounced entry, by contrast, the officers have ordinarily obtained a warrant. Thus, a magistrate has already authorized the intrusion into the residence, and, as *Wilson* makes clear, the question is only whether it would be "reasonable" within the meaning of the Fourth Amendment to enter without a knock and prior announcement. See *Ybarra* v. *Illinois*, 444 U.S. 85, 104 (1979) (Rehnquist, J., dissenting) ("[I]n judging the reasonableness of [a] search pursuant to [a] warrant, we need not measure it against jealously drawn exceptions to that requirement."). It stands to reason that an unannounced entry pursuant to a warrant may be "reasonable" under circumstances that would not justify a wholly warrantless entry into a dwelling. Indeed, in *Wilson*, this Court did not use the term "exigent circumstances" and stressed instead that an unannounced entry need only meet a "flexible" reasonableness standard that weighs the relevant

In *United States* v. *Lalor*, 996 F.2d 1578 (4th Cir.), cert. denied, 510 U.S. 983 (1993), for example, officers broke down the defendant's door with a battering ram while announcing their presence. *Id.* at 1580. The court upheld the search, despite its conclusion that "the evidence of the safety risk to the officers is not compelling." *Id.* at 1584. The particular evidence supporting that risk was that a weapon had been found on the defendant during an earlier arrest; that the defendant had earlier "[been] belligerent and made derogatory remarks about the police"; and "the general proposition that drugs and guns go together." *Ibid.* The court nowhere suggested that the damage to the defendant's property warranted "[m]ore specific inferences of exigency." App., *infra*, 8a (quoting *Becker*, 23 F.3d at 1541).

In *United States* v. *Kennedy*, 32 F.3d 876 (4th Cir. 1994), cert. denied, 115 S. Ct. 939 (1995), the court held that information available to officers executing a warrant—*i.e.*, that the defendant had a criminal record, was participating in a drug conspiracy, and probably had guns in his home, *id.* at 882-883—"amply justified" their failure to await a response before breaking down the defendant's door. *Id.* at 883. Again, there was no indication that damage to the defendant's property triggered a more stringent requirement of justification. Other cases are to the same effect. See *United States* v. *Dahlman*, 13 F.3d 1391, 1394 n.3, 1398 (10th Cir. 1993) (upholding no-knock search in which officers broke the window of a cabin and detonated an

---

"law enforcement interests." 115 S. Ct. at 1918. See *Bodine* v. *Warwick*, 72 F.3d 393, 398 (3d Cir. 1995) (*Wilson* adopts an overall standard of reasonableness that considers exigency as a single factor).

explosive device to distract its inhabitants; failure to announce justified by defendant's statement that he intended to "shoot it out" with police rather than be arrested, defendant's attempt to disarm an officer during a prior arrest, officers' high-visibility approach, and barking guard dog), cert. denied, 511 U.S. 1045 (1994);[9] *United States* v. *Stowe*, 100 F.3d 494, 499 (7th Cir. 1996) (upholding no-knock search in which officers broke down defendant's door with steel battering ram, where police had knowledge that informant had seen defendant in house the night before with drugs and two loaded handguns, defendant had criminal record and alias, and residence had steel doors), petition for cert. pending, No. 96-7439 (filed Jan. 14, 1997); see also *United States* v. *Spinelli*, 848 F.2d 26, 29-30 (2d Cir. 1988).[10]

---

[9] In *United States* v. *Stewart*, 867 F.2d 581 (10th Cir. 1989), the court of appeals stated that an "especially clear" showing was necessary to uphold an unannounced entry, in light of several factors, including the fact that "destruction of physical property took place." *Id.* at 584. More recently, however, the Tenth Circuit rejected the contention that its decision in *Stewart* requires a "specific showing" that "the defendant presents a danger to law enforcement officers in the context of resisting arrest with violence." *United States* v. *Maden*, 64 F.3d 1505, 1509 n.2 (1995).

[10] In determining whether exigent circumstances justify dispensing with a warrant altogether, the Second Circuit uses a multi-factor test that includes as one factor "the peaceful circumstances of the entry." See, *e.g.*, *United States* v. *Gordils*, 982 F.2d 64, 69 (1992), cert. denied, 507 U.S. 1054 (1993). Recently, the Second Circuit applied that test in determining whether officers had adequate grounds for making an unannounced entry pursuant to a warrant. See *United States* v. *Brown*, 52 F.3d 415, 421 (1995), cert. denied, 116 S. Ct. 754 (1996). In upholding the entry in that case, however, the court did not discuss the means of making the entry.

Thus, no other court of appeals focuses on property damage as the pivotal factor that elevates the specificity of proof required to justify an unannounced entry. And under the general approach employed in other circuits, the degree of danger that the officers reasonably believed that they faced in this case would have justified their decision to execute the search warrant for the escaped fugitive without giving prior notice to the occupants of respondent's house.

3. The court of appeals' approach is disruptive to law enforcement in the Ninth Circuit and increases the risk of harm faced by officers executing warrants. Executing search warrants is often highly dangerous. To minimize those dangers, officers sometimes break a window to distract the occupants' attention and draw them to a visible position. In other cases, officers employ force to open a door quickly in order to prevent the occupants from retrieving weapons. If officers must show a near certainty of physical violence in order to justify that type of damage to a door or window upon entry, they will often be forced to forgo minimally intrusive tactics where those tactics would be effective in avoiding violent confrontation. Because the Ninth Circuit's incorrect focus on property damage in evaluating no-knock entries conflicts with the approach employed by other circuits and has dangerous consequences for law enforcement, this Court's review is warranted.[11]

---

[11] This Court has granted certiorari in *Richards* v. *Wisconsin*, No. 96-5955 (to be argued Mar. 24, 1997), which presents the question whether it is always reasonable for officers executing a narcotics-trafficking search warrant to make an immediate, no-knock entry. This case presents a distinct knock-and-announce issue, as the warrant in this case was to search for a fugitive (rather than drugs) and the Ninth

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ALAN JENKINS
Assistant to the Solicitor General
J. DOUGLAS WILSON
Attorney

MARCH 1997

Circuit's rule turns on a consideration—damage to property—that is not at issue in *Richards*.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-30158
D.C. No. CR-94-00379-1-ALH

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

HERNAN RAMIREZ, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the District of Oregon
Ancer L. Haggerty, District Judge, Presiding

[Filed: Aug. 2, 1996]

OPINION

Before: STEPHEN REINHARDT, ALEX KOZINSKI, and FERDINAND F. FERNANDEZ, Circuit Judges.

Opinion by Judge FERNANDEZ; Dissent by Judge KOZINSKI

FERNANDEZ, Circuit Judge:

Hernan Ramirez was indicted for being a felon in possession of firearms. 18 U.S.C. § 922(g)(1). The district court determined that the firearms had been discovered in connection with a violation of Ramirez's

rights under the knock-and-announce law. 18 U.S.C. § 3109. It, therefore, suppressed the evidence of the weapons, and the United States appealed. We affirm.

BACKGROUND

On November 5, 1994, Ramirez and his wife awoke out of their peaceful slumbers to a series of unusual sounds, including the breaking of a window. Their child, too, awoke and started crying. They feared that they were being attacked by burglars. They were not, but by the end of the day Ramirez found himself in the custody of federal agents and charged with a crime—felon in possession of a firearm—which could lead to a lengthy period of incarceration. How he found himself in that predicament takes some telling.

Just three days before, Alan Laurence Shelby had knocked a deputy sheriff down and escaped from custody. He was then facing a term of federal imprisonment of 248 months and had declared that he would not do federal time. He had tried to escape before. One time he had struck an officer, kicked out a jail door, stolen an automobile, and rammed a police vehicle as he attempted to get away. Another time he had attempted to escape by using a rope made from torn bedsheets. At some time in the past he had also threatened to kill witnesses, and, it was said, he had tortured someone with a hammer.

The authorities were understandably anxious to get Shelby back, so they sent out a press release. Almost immediately, on November 3, 1994, a reliable confidential informant contacted Bureau of Alcohol, Tobacco and Firearms Special Agent George H. Kim and told him that he had seen a person he believed to be Shelby at Ramirez's home the day before. Agent

Kim and the informant then drove out to the area, and from some distance away they saw a person who was "very similar to" a photo of Shelby and noted that the man was wearing a blue jumpsuit and was clean-cut. That was the person the confidential informant had seen there the day before. Thereupon, a deputy marshal also went out, and from 1,000 yards away he saw a clean-cut man wearing blue sweats come out of the house. The marshal decided that the man was the person whom Agent Kim had seen.

In the afternoon of the next day, a warrant to arrest Shelby at Ramirez's home was obtained, and that led to the early morning raid on November 5, which brought Ramirez, but not Shelby, into the clutches of the law.

Ramirez's fateful day unfolded in this way. In the predawn hours of November 5, Ramirez, his wife, and their three-year-old child were asleep in their abode. The main house had three bedrooms, a livingroom, an activity room, and a kitchen which led into a small utility room, which, in turn, led into an attached garage. The informant, who said that Shelby was at the house, also "indicated there were supposed to be several guns in the garage." Apparently there were not, and apparently the informant had never seen them there. Nevertheless, that is what he had said.

At 6:15 a.m., 45 armed officers converged on the property. The group included S.W.A.T. teams of state, county, and city officers. The officers set up a portable loud speaker system and began announcing that they had a search warrant, but without waiting for a response they broke the window of the garage and began waving a gun through that window, a maneuver

that was not too efficacious because a curtain got in the way.

The Ramirezes had no idea that police were outside their home, but they did hear the disturbance, did hear the breaking of glass, and thought that they were being burglarized. They feared for their safety and for the safety of their three-year-old child. Thus, in order to frighten the intruder off, Mr. Ramirez obtained a pistol from a utility closet and fired it toward the ceiling of the garage. The officers fired back and shouted "Police." At that point, and only at that point, the occupants of the house realized that it was law enforcement officers who had broken into the home. Ramirez "ran to the livingroom, threw away the firearm across the floor, and threw himself on the floor in a prone position, shaking from fright." By 6:35 a.m., he and his wife, with their child in her arms, had walked out of the house and into police custody. These householders were the only persons captured in the raid. Shelby was nowhere to be found, although Ramirez acknowledged that a photo of Shelby looked like a person who might have been there on November 3.

Based on what occurred at the house that morning, a second warrant was obtained, the gun which Ramirez had fired and another one were seized, and Ramirez found himself in the toils of the law.

JURISDICTION AND STANDARD OF REVIEW

The trial court had jurisdiction over this matter pursuant to 18 U.S.C. § 3231. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3731.

In general, we review determinations of motions to suppress de novo. *United States v. Khan*, 993 F.2d 1368, 1375 (9th Cir. 1993). The trial court's factual findings are reviewed for clear error. *United States v. Negrete-Gonzales*, 966 F.2d 1277, 1282 (9th Cir. 1992). Where no findings of fact were made or requested, this court will uphold a trial court's denial of a motion to suppress if there was a reasonable view to support it. *United States v. Rabe*, 848 F.2d 994, 997 (9th Cir. 1988). The mixed fact and law question of exigent circumstances justifying a failure to comply with the statutory knock and announce provisions of 18 U.S.C. § 3109 is reviewed de novo. *United States v. McConney*, 728 F.2d 1195, 1205 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S. Ct. 101, 83 L. Ed. 2d 46 (1984).

United States v. Becker, 23 F.3d 1537, 1539 (9th Cir. 1994).

DISCUSSION

A. *Knock and Announce*. We have previously had occasion to expatiate on the important role that the Fourth Amendment plays in the protection of our homes—the centers of our family life and our refuge from the rude world. We must now cover that ground again.

As we said in *Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 884 (9th Cir. 1990):

> Nowhere is the protective force of the fourth amendment more powerful than it is when the sanctity of the home is involved. *Boyd v. United States*, 116 U.S. 616, 630, 6 S. Ct. 524, 532, 29 L. Ed.

746 (1886); *United States v. Shaibu*, 895 F.2d 1291, 1293 (9th Cir. 1990) [, *amended and superseded by*, 920 F.2d 1423 (9th Cir. 1990)]; *United States v. Winsor*, 846 F.2d 1569, 1574 (9th Cir. 1988) (en banc). The sanctity of a person's home, perhaps our last real retreat in this technological age, lies at the very core of the rights which animate the amendment. Therefore, we have been adamant in our demand that absent exigent circumstances a warrant will be required before a person's home is invaded by the authorities. *See Shaibu*, at 1293; *United States v. George*, 883 F.2d 1407, 1411 (9th Cir. 1989).

The amendment's force, however, extends even beyond the obtaining of a warrant. Even if a warrant issues, the concerns which lie at the heart of the amendment continue to evoke our solicitude. Our "concern for the privacy, the safety, and the property of our citizens continues. . . ." *Becker*, 23 F.3d at 1540. That concern is reflected in knock-and-announce requirements. As the Supreme Court recently said, "[i]n evaluating the scope of [our Fourth Amendment] right, we have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing." *Wilson v. Arkansas*, — U.S. ——, ——, 115 S. Ct. 1914, 1916, 131 L. Ed. 2d 976 (1995). Among those traditions was "[t]he common law knock-and-announce principle [which] was woven quickly into the fabric of early American law." *Id.* at —, 115 S. Ct. at 1917. The Court, therefore, concluded that as a matter of constitutional law "the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a

search or seizure." *Id.* at —, 115 S. Ct. at 1918. For our purposes, the tradition finds an even more direct expression of societal concern. "It finds expression in the knock and announce statute which allows an officer to 'break open any outer or inner door of a house . . . to execute a search warrant if, after notice of his authority and purpose,' he is refused admittance. 18 U.S.C. § 3109." *Becker*, 23 F.3d at 1540. We insist upon this notice because, as individuals, we fear for our privacy in the face of government might, and we fear for our property and our safety as well.

> "The fear of a smashing in of doors by government agents is based upon much more than a concern that our privacy will be disturbed. It is based upon concern for our safety and the safety of our families. Indeed, the minions of dictators do not kick in doors for the mere purpose of satisfying some voyeuristic desire to peer around and then go about their business. Something much more malevolent and dangerous is afoot when they take those actions. It is that which strikes terror into the hearts of their victims. The fourth amendment protects us from that fear as much as it protects our privacy. . . ."

Id. at 1540 (citation omitted). *See also Soldal v. Cook County*, 506 U.S. 56, 62-63, 113 S. Ct. 538, 544, 121 L. Ed. 2d 450 (1992). As concerned citizens we also fear the needless injuries that might be inflicted upon police officers, or upon a homeowner, as a result of the homeowner's mistaken belief that miscreants are invading his little castle. *See Sabbath v. United States*, 391 U.S. 585, 589, 88 S. Ct. 1755, 1758, 20 L. Ed. 2d 828 (1968) (one facet of rule is to safeguard officers

from injuries inflicted by mistaken homeowners). So it was here. Had Ramirez been less reasonable, the officer at the window might have been killed; had Ramirez been less wise, he or his family might have been killed. As it was, his property was needlessly damaged when his home was broken into.

When the officers executed the warrant they brushed aside the wisdom of history and elicited a response which, if not strictly intended, should have been reasonably foreseen. They seek to excuse their conduct on the grounds that the dangerousness of Shelby resulted in an exigency which permitted them to break into the home of Ramirez without following knock-and-announce requirements.

No doubt exigent circumstances can justify breaking into a house without notice, but "incantation of that phrase does not dissolve the shield that our law provides." *Becker*, 23 F.3d at 1540. When exigency is claimed, we must determine what kind of exigency it was. "We have held that even a mild exigency, like knowledge that a person is dangerous, can justify immediate entry where that can be done without any physical disruption of property. That, of course, is not this case." *Id.* (citations omitted). Here, an officer broke into the home through a window, poked a gun through the window, and was ready to fire the weapon if he deemed it necessary to do so. It takes more than a mild exigency to justify that. "To justify physical destruction of property '[m]ore specific inferences of exigency are necessary.'" *Id.* at 1541 (citation omitted). Was there more? We think not.

Consider. The 45 officers did not fear any of the actual residents of the house and were not attacking a gang or cult hangout where they might be met by a fusillade of gunfire. They were concerned about one person, Shelby, who might be on the premises. But Shelby was not known to have ever shot or shot at anyone. He was an escape artist, who said he would not go to federal prison. He had knocked people down in his escape attempts, and he had stolen a car and run into a police vehicle. His violence towards law enforcement had not extended beyond that, even though he had obviously been arrested on some occasions. Perhaps his degree of dangerousness bespoke a mild exigency. Certainly it did not bespeak more. In *United States v. McConney*, 728 F.2d 1195 (9th Cir.) (en banc) *cert. denied*, 469 U.S. 824, 105 S. Ct. 101, 83 L. Ed. 2d 46 (1984), for example, we found a mild exigency when an officer knew that McConney was a member of Hell's Angels, had a conviction for a violent crime, was a drug dealer, and had spoken of protecting club members. *Id.* at 1206. That justified an announcement and a simultaneous entry through an unlocked screen door. *Id.*

On the other hand, in a case where a person in a drug dealer's apartment was known to own a gun, but there was no indication that he had the gun with him, we found no exigent circumstances at all. *See United States v. Fluker*, 543 F.2d 709, 717 (9th Cir. 1976). And in *United States v. Mendonsa*, 989 F.2d 366, 370-71 (9th Cir. 1993), we found the circumstances insufficient to justify breaking into a house after the police heard a little noise, even though an occupant was a drug dealer who had a prior felony conviction for armed robbery. We also found no exigency where all

the police had was a generalized concern about drug dealers. *See United States v. Moreno*, 701 F.2d 815, 817-18 (9th Cir. 1983), *vacated on other grounds*, 469 U.S. 913, 105 S. Ct. 286, 83 L. Ed. 2d 223 (1984). The same sort of generalized unspecific concerns proved insufficient in *Becker*, 23 F.3d at 1541.

We did find a mild exigency in *United States v. Von Willie*, 59 F.3d 922 (9th Cir. 1995), where the police sought to execute a search warrant at the home of an armed warlord for a motorcycle gang. *Id.* at 924. In that case, the police did attempt to comply with § 3109 at one door, did comply with it at another door, but seized Von Willie at still a third door without compliance after he had seen them and was trying to shut them out. Under the combination of what was known before plus what happened on the scene, we validated an entry which took place with no destruction of property. *Id.* at 925-26. Similarly, in *United States v. Scott*, 74 F.3d 175 (9th Cir. 1996), *petition for cert. filed*, (June 6, 1996) (No. 95-9248), we found a mild exigency. The police arrived on the scene to execute a warrant. Scott opened the blinds and saw them; he had a weapon in his hand. *Id.* at 176. He then attempted to close an open door, as the police announced their presence and that they had a warrant. They then forced their way into the room. *Id.* at 177. We were satisfied that there was a mild exigency, and we excused any failure to comply with the knock-and-announce rule. *See also United States v. Reed*, 15 F.3d 928, 934 (9th Cir.1994) (likely armed suspect saw the police and closed the door). None of those circumstances inform the case at hand. There is no suggestion that the police presence was known, no confirmation that Shelby was on the premises, and, more

importantly, no indication that Shelby was armed and would resist with deadly force.

We were considerably more impressed when the police knew that the person they were after had a gun and had heard him say that he kept the gun to use against the police themselves. *United States v. Turner*, 926 F.2d 883, 885 (9th Cir.), *cert. denied*, 502 U.S. 830, 112 S. Ct. 103, 116 L. Ed. 2d 73 (1991). We were equally impressed in *United States v. Perez*, 67 F.3d 1371, 1384 (9th Cir. 1995), *reh'g en banc granted*, 77 F.3d 1210 (9th Cir. 1996), and for much the same reasons. There the police on the scene realized that Perez probably knew they were present. Moreover, he was probably armed, had killed before, and had said that if arrested "he intended to 'go down shooting.'" *Id.* In both cases we did find more than a mild exigency. Of course, the police had no such information about Shelby. They neither knew that he had a gun, nor that he had access to one, nor that he would consider using one against them.

We have touched upon all of these cases because our review is necessarily fact-bound. Our cases do not describe a simple straight line, rather they graph a much more complex curve. Police must have some leeway in balancing the demands of the knock-and-announce requirement against other safety considerations. Nevertheless, the courts must ultimately determine whether the police struck that balance properly. We think it clear that the police did not do so in this case.

Again, the householders themselves presented no known danger. If he was there, Shelby might wish to escape, but the phalanx of already positioned officers on hand made escape unlikely. Moreover, there was

no specific evidence that Shelby was armed, that he would use firearms against the officers, or that when he was faced with that show of force he would do anything violent at all. Also, before the break-in nothing developed on the scene which would have added to the circumstances already known and, thus, raise them to a higher degree of exigency. In short, we agree with the district court that the knock-and-announce rules were violated in this case.[1]

B. ***Causation.*** When Ramirez walked out of his house and into the arms of the waiting police, he was seized. He then admitted that he had fired the gun, that another gun was on the premises, and that he had previously committed felonies in California. Those admissions and the fact that an officer had seen the discarded pistol in the livingroom led to a second warrant and a seizure of the weapons. It is the use of those weapons in evidence which Ramirez seeks to suppress.[2]

---

[1] The careful reader will note that we have assumed that there was probable cause for the issuance of the warrant in the first place. There may well be some doubt about that, when the most that was known was that Shelby had been at Ramirez's house on two occasions two or three days earlier. Nevertheless, we give considerable deference to the issuing magistrate. *See Perez*, 67 F.3d at 1382. Because of that deference and because it is unnecessary to our resolution of this case, we have assumed rather than decided that there was probable cause.

[2] We do not consider the statements themselves, which clearly were not severable from the arrest of Ramirez, because no issue regarding them is before us. *But see United States v. Ricardo D.*, 912 F.2d 337, 342 (9th Cir. 1990) (confession following illegal arrest suppressed).

Because the initial entry into Ramirez's house was illegal, he is entitled to have the weapons suppressed if "the police obtained the evidence 'by exploitation of the illegality.'" *United States v. Jones*, 608 F.2d 386, 390 (9th Cir. 1979) (quoting *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441 (1963)). It is clear that a mere "but for" causal connection will not lead to suppression. Rather, we must conduct an inquiry by applying three tests:

> First, we consider the proximity of the illegal arrest with the seizure of the evidence. Second, we consider whether there were independent intervening events that led the police to the evidence. Third, we consider the effect of suppression on the exclusionary rule's purpose of deterring police misconduct. The three factors are closely interrelated.

United States v. Shephard, 21 F.3d 933, 939 (9th Cir. 1994) (citation omitted); *see also Jones*, 608 F.2d at 391.

The first of these factors is easily met; the seizure of the guns could hardly be more proximately linked to the police break-in itself. They came as the most direct, if not the only, result of the morning's activities. Similarly, there can be little doubt that suppression would serve to dissuade the police from this kind of unnecessary invasion of people's homes. It would encourage, even exhort, them to use more caution. Only a particularly cynical view of government would induce us to think otherwise. The third factor weighs in favor of suppression.

That leaves the second factor—was there an independent intervening event? We think not, but that requires a bit more explanation. In the mine run of cases, the determination is relatively straightforward. If an unlawful search follows directly on the heels of an unlawful arrest, suppression will likely follow. *See, e.g., Shephard*, 21 F.3d at 939-40; *cf. Jones*, 608 F.2d at 390-91. If an unlawful search ultimately leads to the seizure of tangible materials, they, too, will be suppressed if their connection is close enough. *See Murray v. United States*, 487 U.S. 533, 536-38, 108 S. Ct. 2529, 2532-33, 101 L. Ed. 2d 472 (1988); *United States v. Hill*, 55 F.3d 479, 481 (9th Cir. 1995); *United States v. Santa Maria*, 15 F.3d 879, 883 (9th Cir. 1994). If a confession is closely tied to an illegal arrest, suppression will often follow. *See Orhorhaghe v. INS*, 38 F.3d 488, 504 (9th Cir. 1994); *Ricardo D.*, 912 F.2d at 343. The principles which animate these cases would seem to lead directly to a conclusion that suppression is required in this case. However, the government claims that there was an intervening event which broke the causal chain. That event was Ramirez's firing of the pistol at the ceiling when he thought that would help protect his family against malevolent intruders. We disagree with the government.

There was no gap or attenuation between the break-in and the firing of the weapon. More than that, the police were very lacking in perspicacity if they failed to foresee the reaction they encountered. What could they have expected when they broke into the home of a sleeping family in the early hours of the morning? If they did not intend to elicit a strong protective reaction, they must have willfully blinded themselves

to that possibility. *Cf. United States v. Jewell*, 532 F.2d 697, 700-04 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951, 96 S. Ct. 3173, 49 L. Ed. 2d 1188 (1976); *United States v. Aguilar*, 80 F.3d 329, 332-33 (9th Cir. 1996) (en banc).

The government, nevertheless, says that when a new illegal act intervenes, the chain is broken because police illegality should not be taken to justify citizen illegality. That general proposition is accurate enough in the abstract, but the cases which support it have no application here. No doubt a homeowner is not justified in aiming a semiautomatic weapon at persons he knows to be police officers, even if they happen to have entered his home illegally. *See United States v. Waupekenay*, 973 F.2d 1533, 1537-38 (10th Cir. 1992). Similarly, when an officer is engaging in an illegal arrest, if the suspect engages in illegal resistance, that new violation may well justify a new and proper arrest. *See United States v. Dawdy*, 46 F.3d 1427, 1431 (8th Cir.), *cert. denied*, 423 U.S. 934, 116 S. Ct. 195, 133 L. Ed. 2d 130 (1995). We reached just that conclusion in *United States v. Garcia*, 516 F.2d 318 (9th Cir.), *cert. denied*, 423 U.S. 934, 96 S. Ct. 290, 46 L. Ed. 2d 265 (1975). In that case officers ordered Garcia to pull over at what we assumed to be an illegal checkpoint. Garcia did so at first, but then sped off and led the officers on a high-speed chase. *Id.* at 319. That illegal flight and the ensuing chase supplied the necessary intervening activity to justify Garcia's arrest. *Id.* at 320. We said that unless the officers had acted for the very purpose of initiating the chase activity, we would not find the second stop to be illegal. *Id.* at 319-20; *cf. United States v. Ogilvie*, 527 F.2d 330, 332 (9th Cir. 1975)

(explaining the limitations of Garcia); *United States v. Morrison*, 546 F.2d 319, 320 (9th Cir. 1976) (same).

In the case at hand, Ramirez did not threaten or flee from persons whom he knew to be police officers. Quite the contrary. He fired a gun at the ceiling of his own home when unknown intruders were invading it. The government does not claim that he committed a crime when he did that, unless, of course, the crime was the fact that he had a gun at all. But to the extent that it was a crime for him to have a gun, that crime did not intervene. It existed before the police engaged in their unlawful intrusion. That crime was brought to light by the intrusion itself. We agree with the Eleventh Circuit's determination that if the act of a suspect is not a new and distinct crime, but is simply a legal act which reveals the fact of some crime—such as possession of an illegal substance— it will not erase the taint. *United States v. Bailey*, 691 F.2d 1009, 1016-17 (11th Cir. 1982), *cert. denied*, 461 U.S. 933, 103 S. Ct. 2098, 77 L. Ed. 2d 306 (1983). To paraphrase that decision: Ramirez was in possession of the gun before the police misconduct occurred, and his response to the misconduct only revealed this extant crime and did not itself constitute a crime—*i.e.*, firing a gun at the ceiling of his own home to scare off intruders is not a crime; possessing the weapon is. *Id.* at 1017.

We, therefore, determine that there was no intervening event, the second element of our analysis favors suppression, and suppression must follow.

CONCLUSION

The flame of our Fourth Amendment liberties is bright and strong—that should come as no surprise. It has been tended by lovers of liberty for over two centuries. While it burns, it keeps our homes free from unlawful intrusions by the government. Still, it is just a flame, and it will be quickly quenched if it is not protected. Should that occur, a tenebrific atmosphere would envelop our liberties and our homes. That must not happen.

We hold that Ramirez's statutory and Fourth Amendment rights were violated when government agents broke into his home in the early morning hours without complying with the knock-and-announce requirements. We also hold that the district court correctly suppressed use of the seized weapons as evidence against him.

AFFIRMED.

KOZINSKI, Circuit Judge, dissenting.

1. The majority opens up a square conflict with *United States v. Turner*, 926 F.2d 883 (9th Cir.), *cert. denied*, 502 U.S. 830, 112 S. Ct. 103, 116 L. Ed. 2d 73 (1991), a case where we upheld a no-knock entry. In *Turner*, police forced open a locked apartment door and entered the defendant's bedroom; Turner argued the no-knock entry was illegal because the police couldn't be sure he was armed, but we upheld the search. The majority contrasts Turner with Shelby, characterizing the former as a "considerably more impress[ive]" threat, maj. op. at 9466, and the latter as an "escape artist" whose "degree of dangerousness bespoke a mild exigency," if that. *Id.* at 9465.

The record contradicts the majority's romantic description of Shelby—a hardened and desperate criminal, much more dangerous than Turner. But words are cheap; here are facts:

	Turner	Shelby
Current access to guns	Highly likely	Highly likely
Past access to guns	"Turner kept weapons in the apartment he used for his drug operations."	"Shelby was a major Methamphetamine manufacturer and has had access to large caches of weapons."

Threatened police	Yes	Yes
Threatened police	No	Yes
Escape attempts	0	3
Police and civilians assaulted	0	3
People tortured	0	1
Criminal Record	1 conviction for receiving stolen property, 17 years earlier	Serving 20 years plus, on state and federal charges for dealing methamphetamines and using a gun in a drug transaction.
Knew police were looking for him	No	Yes

My colleagues trip lightly over the fact that Shelby had "a history of violent escapes." ER at 22. But, in his dogged efforts to flee from custody, Shelby not only struck two law enforcement officers, but "assaulted a woman in a parking lot and stole her vehicle," *id.*; he then crashed into a police car in making his getaway. Assaulting helpless civilians and then using a ton of mechanized steel as a battering ram hardly comports with the majority's characterization of Shelby as a latter-day Harry Houdini. The ma-

jority also dismisses reports of Shelby's torture activities with "it was said," as if to suggest they lacked substance. Maj. op. at 9459. But the record is positive on this point: "Alan Shelby has brutally tortured others in the past with a hammer." ER at 22. The majority's characterization of Shelby as "[p]erhaps . . . mildly dangerous," is more than mildly off the mark.

The majority posits two main distinctions between Shelby and Turner. First, it argues, Turner had threatened to kill police while Shelby had not. Wrong. Shelby had "made threats to kill witnesses and police officers associated with his incarceration." ER at 22. Next, the majority says, the police here didn't know Shelby had access to weapons, while the police in *Turner* did. Wrong again. In *Turner*, the police only knew that the suspect was armed at another location. Turner claimed the police had no way of knowing he would carry a gun with him, but we rejected his argument: Although "[the police] may not have had specific information that Turner currently had weapons, . . . the facts they did have made this highly likely." 926 F.2d at 887.

Here, the police had more information about the suspect's access to weapons than in *Turner*. According to the Confidential Reliable Informant (CRI), Shelby was hiding in the home of another suspected drug dealer, ER at 52; two law enforcement officers confirmed that someone matching Shelby's description was on the premises. ER at 23-24. The Informant also told police that "there were supposed to be guns in the garage," ER at 52, a garage attached to the house where Shelby was thought to be hiding. Police thus not only were informed that Shelby was

at that location, but that there were guns there—something the police in *Turner* merely surmised. The police in our case did have to infer that Shelby or someone else in the house might go for the guns if cornered but, as we said in *Turner*, "the facts that [the police] did have made this highly likely." 926 F.2d at 887.

The majority's every effort to disparage the search here only underscores the conflict with *Turner*. The majority criticizes the police for failing to recognize they "were not attacking a gang or cult hangout where they might be met by a fusillade of gunfire," maj. op. at 1301; the same was true in *Turner*. The majority complains that "[t]here is no suggestion that the police presence was known," *id.* at 1302; Turner complained about the exact same thing. *See* 926 F.2d at 887. The majority points out that "the phalanx of already positioned officers on hand made escape [by Shelby] unlikely," maj. op. at 1302; in *Turner*, we held that "[t]he number of officers surrounding the building and Turner's lack of prior charges for escape are irrelevant." 926 F.2d at 887. The majority carps, "Shelby was not known to have ever shot or shot at anyone," maj. op. at 1301; Turner hadn't even committed a violent crime. Every argument the majority makes here was considered and rejected in *Turner*.[1]

---

[1] Any material differences between this case and *Turner* cut against the majority's conclusion. First, the intrusion in *Turner* was much more serious than that here. In *Turner*, police broke into the apartment and "found Turner in bed with a woman." 926 F.2d at 886. Here, they broke a single window of the *garage* where they were told the guns were located and poked a gun through the hole. Quite clearly, this was an effort to keep Shelby (or whoever else was in the house) from making

My colleagues try to duck *Turner* by claiming that our cases "graph a . . . complex curve." *Id.* at 9467. But if the law is that much in turmoil, we must call for sua sponte en banc. *See Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1479 (9th Cir. 1987) ("A panel faced with [an irreconcilable] conflict must call for en banc review. . . ."). In fact, there is no pre-existing conflict because *Turner* is the only case on point. The other cases the majority cites did not involve the breaking of property;[2] no more than a mild exigency was thus required to uphold those entries. These cases did not—could not—speak to whether a more serious intrusion was warranted.

The majority's ruling not only creates a circuit conflict, it's bad law on its own terms. There is much rhetoric in the opinion about the sanctity of every man's "little castle," but the principal reason we can sleep safely at night is that the men and women of law enforcement put their lives on the line to keep our

---

a run for the weapons. While the maneuver failed, it was a rational and measured effort by the police to deal with the dangerous situation presented to them. The search here was also much less troublesome than in *Turner* because police had obtained a no-knock warrant. In *Turner*, police decided to break down the door unilaterally and on the spur of the moment. Finally, unlike in *Turner*, police here tried, albeit unsuccessfully, to announce their presence. ER. at 53 (the police announced their presence over a loud speaker, but Ramirez could not determine what was going on); *see United States v. Moreno*, 701 F.2d 815, 817 n.3 (9th Cir. 1983) ("An attempt to notify by knocking and announcing complies with the statute whether or not it is heard."), *vacated on other grounds*, 469 U.S. 913 (1989).

[2] *E.g., United States v. VonWillie*, 59 F.3d 922 (9th Cir. 1995); *United States v. Scott*, 74 F.3d 175 (9th Cir. 1996); *United States v. Reed*, 15 F.3d 928 (9th Cir. 1994).

castles from being invaded by brutal criminals. When police track down "a major Methamphetamine manufacturer[, who] has had access to large caches of weapons" and a history of torture and other violent conduct, they are entitled to take precautions. A castle, little though it be, often looks like a fortress from the outside; police cannot know what's lurking within. It's easy enough, sitting in our well-guarded offices, and with the benefit of hindsight, to issue pronouncements about what the police should or could have done, but this provides little useful guidance to police in the field who must make difficult judgments in unknown territory and subject to unpredictable developments. What if the police had adopted the majority's rosy view of Shelby and had politely tapped at the door and asked if he would come along, but Shelby had seized the guns in the garage, taken the Ramirez family hostage and precipitated a shoot-out? No doubt, we would then have issued a similarly smug opinion, this time lecturing the police that they were not free to ignore the words and warnings of their CRI, and affirming the payment of compensation to the Ramirezes or anyone else harmed in the altercation.

My guess is that, had any of us been in charge of this operation—had we been responsible for the lives and safety of dozens of law enforcement officers and the family sleeping inside—we would have done just what the police here did. To have done less would have been foolhardy (my colleagues' high-fallutin' rhetoric notwithstanding); to have done more would have been excessive. The police properly balanced the homeowner's privacy and property interests against the dictates of security. *See Wilson v. Arkansas*, 115 S.

Ct. 1914, 1918 (1995) ("The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests."); *United States v. Bustamante-Gamez*, 488 F.2d 4, 10 (9th Cir. 1973) ("[I]t has never been suggested that the [no-knock] requirement is an inflexible one; both at common law and in the constitutional context the courts have acknowledged that the interests [protected by the rule] may give way to other considerations."), *cert. denied*, 416 U.S. 970 (1974). They deserve to be congratulated, not chastened and ridiculed.

2. Even had the no-knock search been illegal, this would provide no grounds for suppression of the evidence pertaining to Ramirez. In reaching the contrary conclusion, the majority raises conflicts with two other of our cases, *United States v. Jones*, 608 F.2d 386 (9th Cir. 1979), and *United States v. Garcia*, 516 F.2d 318 (9th Cir.), *cert. denied sub nom. Martinez- Lopez v. United States*, 423 U.S. 934 (1975). In *Jones*, the police arrested the defendant on suspicion of a Los Angeles area burglary and found a motel room key on him; they then searched the room and discovered evidence of an unrelated burglary at San Francisco's Presidio. Although the initial arrest was illegal, evidence obtained from the motel room was not excluded because exclusion could have had no deterrent value. We held it "crucial" that the police were not investigating the Presidio burglary when they illegally found the evidence, because "[d]eterrence can have its effect only when it can be said that an object of the illegal conduct was the securing of the evidence sought to be suppressed." *Id.* at 391

(quoting *Allen v. Cupp*, 426 F.2d 756, 759 (9th Cir. 1970)). Here, the police weren't out to catch a felon in possession; they didn't even know Ramirez owned the house, much less that he was a felon.[3] The object of the supposedly illegal search was the arrest of Alan Shelby for escape; police couldn't possibly be deterred by the threat of exclusion of evidence relating to a completely different person and crime. *Cf. Allen*, 426 F.2d at 759 (exclusion when illegal police conduct inadvertently reveals evidence would merely "make tasting the fruit more difficult, but would not diminish its temptation").

The majority leaps over the deterrence question with a single bound: "[T]here can be little doubt that suppression would serve to dissuade the police from this kind of unnecessary invasion of people's homes." Maj. op. at 9469. This is contrary to *Jones* and other cases where we have held that suppression can provide no deterrence when police officers, through

---

[3] Ramirez apparently was fond of pseudonyms. Utility records indicated a "Hernan Rios" lived at 23170 S.E. Bohna Park Rd. ER. at 24. The CRI, however, said the owner went by "Angel" or "Havannah." *Id.* DMV records showed an "Angel Rios" had a driver's license in the name "Angel Estrada." *Id.* Even after the raid, the police weren't sure who Ramirez was. The affidavit for the second warrant seeks to search "the premises occupied by Herman Ramirez aka Hernan Ramirez, Angel Estrada." *Id.* at 44.

Ramirez's criminal record was also unknown to the police before the search. After the search, Ramirez told police that his birthday was May 8, 1957, and he had been convicted of burglary in 1981. *Id.* at 45. Only then did a check of police records reveal a Hernan or Herman Ramirez who was born on May 8, 1955 and was convicted of rape in 1978 and burglary with a firearm in 1982. *Id.* at 46.

"investigatory serendipity," stumble across evidence of a crime of which they were previously unaware. *See United States v. Bacall*, 443 F.2d 1050, 1056 (9th Cir.) (it's "crucial to a determination of taint" that police didn't suspect the defendant of the crime for which their illegal activity produced evidence), *cert. denied*, 404 U.S. 1004 (1971); *Durham v. United States*, 403 F.2d 190, 196 (9th Cir. 1968) ("The price is too high and the advantage too uncertain to make it reasonable to suppose that law enforcement officers will be encouraged to indulge in unlawful searches, knowing that what they find will be suppressed, in the hope of obtaining admissible evidence as remote and fortuitously acquired as this.").

The majority creates yet a third conflict, this time with *United States v. Garcia*. Garcia was stopped at an illegal checkpoint but then sped off and was captured; police searched the car and found marijuana. We declined to suppress. The suspect's intervening act, we held, gave police new grounds for probable cause that were untainted because police didn't intend to provoke the response. *Garcia*, 516 F.2d at 320 ("By ordering [the defendant] to stop, the officer could hardly have intended him to flee."). Here, police developed new grounds for searching Ramirez's house when he fired his gun. Following *Garcia*'s rationale, Ramirez's use of the gun was evidence untainted by the (supposed) earlier illegality, unless police *intended* to provoke the response. It's ludicrous to suppose the police broke the garage window hoping to provoke those inside to shoot at them. The majority claims, inexplicably borrowing a deliberate ignorance instruction from substantive criminal law, that the police "willfully blinded themselves to [the] possi-

bility" of Ramirez's response, maj. op. at 9470 (citing *United States v. Jewell*, 532 F.2d 697, 700-04 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976)). But, according to *Garcia*, the test isn't willful blindness, it is intent. Far from intending that the occupants of the house shoot at them, the police here tried to prevent a shoot-out by covering the area where they thought the guns were stored. Because Ramirez's intervening act was not "the *intended result* of illegal police conduct," *Garcia*, 516 F.2d at 319 (emphasis added), it attenuates the alleged taint from the no-knock entry.

* * * * *

Opinions like this lend support to the notion that the Ninth Circuit is not a single court but a series of disaggregated panels whose judges are guided by their predilections rather than precedent. Because I cannot join in this wholesale flouting of circuit authority. I dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Cr. No. 94-379-HA

UNITED STATES OF AMERICA, PLAINTIFF

v.

HERNAN RAMIREZ, DEFENDANT

[Filed: May 4, 1995]

OPINION

HAGGERTY, Judge:

Defendant was indicted for being an ex-felon in possession of firearms. Defendant moves to suppress evidence regarding his possession of the weapons at issue because such evidence was obtained as a direct result of the execution of a warrant that (1) lacked sufficient probable cause, and (2) was unreasonably executed. A hearing was conducted on 24 April 1995, at which oral argument was presented regarding the motion. This court denies the motion to suppress as to the issue of insufficient probable cause, but grants the motion as it pertains to the execution of the warrant.

BACKGROUND

Counsel have stipulated to most facts surrounding the issuance of the two warrants involved in this case, and the subsequent arrest and charging of defendant. In the early morning of 5 November 1994, several dozen law enforcement officers encircled defendant's home in Boring, Oregon, to execute a federal search warrant seeking fugitive Alan Lawrence Shelby. Shelby had escaped custody while enroute to testify in a matter in Tillamook County. The United States Marshal obtained a warrant for Shelby's arrest, and conducted a manhunt that led to defendant's home.

On 5 November 1994, law enforcement officers surrounded defendant's residence, identified themselves over bullhorns, and ordered the residence's occupants to come outside. At the same time, officers outside the home's garage shouted "Sheriff - search warrant," and broke a garage window. Defendant fired a gun from inside his home, prompting a hail of return fire from the officers. Defendant was forced from his residence and, after advice and waiver of rights, acknowledged that he was a convicted felon, and that he owned the gun he had fired as well as another weapon. This information, coupled with an officer's observation of a weapon inside defendant's home, was used to obtain a second search warrant permitting officers to re-enter defendant's home later that day to retrieve the weapons. Fugitive Shelby was not found at the residence during either search. Defendant, however, was arrested and charged with being a convicted felon in possession of weapons in violation of 18 U.S.C. § 922(g)(1).

ARGUMENTS

Defendant challenges the validity and execution of the first warrant regarding the search for Shelby. That warrant's execution provided the grounds for the second warrant pertaining to defendant's weapons, and led directly to the seizure of those weapons. Defendant contends that the seizure of the weapons must be suppressed because the first warrant seeking Shelby lacked sufficient probable cause and was improperly executed.

1. Probable Cause

Defendant first contends that the affidavit submitted in support of the warrant for Shelby was insufficient to justify a conclusion that Shelby was probably on defendant's premises at the time it was to be searched. A magistrate's role is to determine whether, given all the circumstances set forth in the supporting affidavit, there is a fair probability that what is being sought will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The magistrate determines this by considering the totality of the circumstances, and a court reviewing this decision must ask whether the magistrate had a substantial basis for concluding that sufficient probable cause existed to issue a warrant. *Id.*

This court is satisfied that the magistrate had a substantial basis for finding probable cause to believe that the fugitive being sought would be found at defendant's residence. The affiant stated that a confidential, reliable informant reported that he had seen a man named "Alan" at the residence, and that "Alan" had uttered words to the effect that "I had

to knock out a guard." During his escape, Shelby had slipped from his handcuffs and had assaulted an officer.

The informant had provided correct information previously, leading to the arrest of another fugitive, and, when driven to defendant's residence by an officer, the informant identified a man who was washing a car in the driveway as "Alan." The officer with the informant found the man to be similar in appearance to a photograph of Shelby.

The affiant also stated that he had made a second reconnaissance of defendant's residence, and that a man resembling Shelby had emerged from the home during his surveillance. Because of distance, however, a positive identification could not be made.

This affidavit established a substantial basis upon which the magistrate could reasonably conclude that under the totality of the circumstances, there was probable cause to believe that Shelby would be found at defendant's residence. Defendant's motion to suppress is denied as it pertains to the claim that the affidavit failed to establish probable cause.

2. Execution of the Shelby Warrant

Defendant also contends that the execution of the first warrant violated his Fourth Amendment rights and did not comply with 18 U.S.C. § 3109. That statute provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate

himself or a person aiding him in the execution of the warrant.

See also United States v. Mendonsa, 989 F.2d 366 (9th Cir. 1993).

There is no factual dispute that the officers in this case failed to adhere to the knock and announce requirements described by 18 U.S.C. § 3109 when they "announced their identity and purpose but, for safety reasons, broke the garage window before waiting for the occupants to respond." Government's Memorandum in Opposition at 7.

The Ninth Circuit recently stated that the Fourth Amendment's "concern for the privacy, the safety, and the property of our citizens continues and is reflected in knock and announce requirements" such as those established in 18 U.S.C. § 3109. *United States v. Becker*, 23 F.3d 1537, 1540 (9th Cir. 1994). In *Becker*, the court acknowledged that mild exigency, such as knowledge that a person is dangerous, can justify an immediate entry that is done without physical destruction of property. *Id.*

To justify a warrant entry that is accompanied by physical destruction of property, however, more specific inferences of exigency are necessary. *Id.* at 1541. The government acknowledges that the officers' entry into defendant's home included the physical destruction of defendant's garage window. The government contends that highly specific facts known about Shelby, which were reported to the magistrate, establish adequate inferences of exigency as required by *Becker*. Shelby was known to have assaulted a deputy in making his escape a few days before the warrant was executed. He had been convicted of manufacturing methamphetamine, using a firearm during a

crime, and armed robbery. He was reported to have stated that he would "not do federal time." In 1991 Shelby struck a corrections officer and kicked a jail door. During an escape he assaulted a woman, stole her vehicle, and rammed a police car. Shelby was also reported to have made threats to kill witnesses and officers during his incarceration, and prior to his imprisonment, to have tortured other persons with a hammer. He was also thought to have access to large caches of weapons.

This information regarding Shelby was reported in the affidavit supporting the request for a warrant to search defendant's property, and the affiant requested that "the court grant a no-knock warrant exception." Ex. A, attached to Defendant's Memorandum in Support of the Motion to Suppress. Additionally, the government discloses that the officers had information pertaining to the defendant himself that heightened their concerns. Defendant was believed to be selling drugs and storing drugs and guns in his garage.

This Court is satisfied, as was the magistrate, that there were sufficient exigent circumstances to have allowed immediate entry into defendant's residence where entry could be obtained without physical destruction of property. *Becker*, 23 F.ed at 1540; *United States v. McConney*, 728 F.2d 1195, 1206 (9th Cir. 1984) (en banc) (opening of an unlocked screen door was found permissible because of exigent circumstances). The officers' knowledge of Shelby's violent past justified an immediate, no-knock entry into defendant's residence.

Knowledge of Shelby's violent past and defendant's suspected drug activity, however, was insufficient to meet the stricter standard required by *Becker* when

officers physically destroy property while gaining entry into a residence. As the Ninth Circuit recognized in *Becker*, neither knowledge of a possible occupant's prior convictions for armed robbery, nor of the possible possession of a weapon, provides sufficient exigency to justify breaking into a house. Nor is the danger inherent in pursuing drug dealers sufficient to justify an immediate entry that is accompanied by destruction of property. *Becker*, 23 F.3d at 1541.

Although there were specific facts known regarding Shelby's propensity to attempt escape, his disdain for federal incarceration, and his past willingness to use threats and violence as a means of intimidation, there was no information that he was armed and dangerous at defendant's home, or that he would present any specific dangers to arresting officers if found there. There are insufficient exigent circumstances to establish that Shelby presented such a threat to the force deployed to apprehend him in the early morning of 5 November as to justify abandon ing the "simple and ancient requirement that the officer[s] 'ought to signify the cause of [their] coming, and to make request [sic] to open doors'" before destroying property during a governmental intrusion into a person's home. *Becker*, 23 F.3d at 1541.

Defendant had legitimate privacy, property and safety interests which were entitled to protection under the Fourth Amendment. The law officers' decision to compromise those interests by choosing instead to destroy property while intruding suddenly into defendant's home, although prompted by a knowledge of Shelby's past, was not sufficiently supported by circumstances suggesting that the fugitive posed

a particular danger to others during this attempted apprehension.

CONCLUSION

Because the specific inferences of sufficient exigency which must accompany the physical destruction of property during an unannounced entry are lacking in this case, defendant's motion to suppress must be granted as to this issue. There is no dispute that the basis for the second search warrant of defendant's home, and the subsequent seizure of the weapons, were direct consequences of the manner in which the first warrant was executed. For the reasons stated above, this court concludes that the manner of this execution was improper, and the subsequent "fruit" of the improper execution is tainted and must be suppressed.

Defendant's motion to suppress is denied as to the contention that the initial search warrant was unsupported by probable cause. The motion to suppress is granted, however, as it pertains to the law officers' violation of the protections afforded defendant under the Fourth Amendment and 18 U.S.C. § 3109. The seizure of the weapons found in defendant's possession, which resulted directly from an improper warrant execution during the early morning of 5 November 1994, is suppressed.

Dated this 4 day of May, 1995.

/s/ ANCER L. HAGGERTY
ANCER L. HAGGERTY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Cr. No. 94-379-HA

UNITED STATES OF AMERICA, PLAINTIFF

v.

HERNAN RAMIREZ, DEFENDANT

[Filed: May 4, 1995]

ORDER

HAGGERTY, Judge:

Defendant's motion to suppress (doc. # 19) is denied in part and granted in part. The motion is denied as to the contention that the initial search warrant was unsupported by probable cause. The motion to suppress is granted, however, as it pertains to the law officers' violation of the protections afforded defendant under the Fourth Amendment and 18 U.S.C. § 3109.

The seizure of the weapons found in defendant's possession which resulted directly from the improper warrant execution during the early morning of 5 November 1994, is suppressed.

IT IS SO ORDERED.

Dated this 4 day of May, 1995.

/s/ ANCER L. HAGGERTY
ANCER L. HAGGERTY
United States District Judge

APPENDIX C

AFFIDAVIT

I, Wayne Kauffmann, being duly sworn do hereby depose and say:

1. I am a Deputy U.S. Marshal and have been so employed for 5 years.

2. On November 2, 1994, the U.S. Marshals Service in Portland, Oregon, received information that a prisoner named Alan Lawrence Shelby had escaped from the Tillamook County Sheriff on November 1, 1994. Alan Shelby had slipped out of his handcuffs during transport and assaulted a Deputy Sheriff by knocking him down. Shelby then fled on foot and has not been seen since.

3. I then reviewed the file on Alan Shelby and obtained the following facts.

A. That Alan Lawrence Shelby was sentenced on Criminal Case Number: CR.91-60195-1 charging Conspiracy to Manufacture, Possession with Intent to Distribute and Distribution of Methamphetamine, in violation of 21 USC 841(a)(1) and 846, and the charge of Use of a Firearm During a Drug Crime, in violation of 18 USC 924(c).

B. That Alan Lawrence Shelby was sentenced on August 31, 1992 by the Honorable Michael R. Hogan, United States District Judge for the District of Oregon, for a period of 188 months on count 1 of the

Indictment, and 60 months consecutive on count 2 of the Indictment.

C. That Alan Lawrence Shelby had a history violent escapes in his criminal history.

D. That Alan Shelby made statements in the past, overheard by OSCI officers that he planned to escape from a transport van when he had a chance. Shelby also stated that he "will not do federal time".

E. That Alan Shelby was serving a concurrent Federal Sentence with his State Sentence at the Oregon State Penitentiary.

F. That Tillamook County Sheriff took temporary custody of Alan Shelby and transported him to the Tillamook County Courthouse.

G. That Alan Shelby escaped from custody as he stated he would.

H. That Alan Shelby attempted escape in 1991 by striking a corrections officer in the face and kicking out the door of the jail. Shelby ran from the jail and assaulted a woman in a parking lot and stole her vehicle. During the escape attempt, Shelby rammed a police vehicle with the stolen vehicle.

I. That while awaiting trial in Eugene on Narcotics and Weapons charges, Shelby attempted to escape from the Lane County Jail by constructing a rope made from torn bed sheets and breaking a window.

J. That Alan Shelby has made threats to kill witnesses and police officers associated with his incarceration.

K. That Alan Shelby has brutally tortured others in the past with a hammer.

L. That Alan Shelby was a major Methamphetamine manufacturer and has had access to large caches of weapons.

4. Based on this information, a task force was established which consisted of the following agencies: U.S. Marshals, FBI, Oregon Department of Corrections and the Tillamook County Sheriff's Office. A press release was sent to the media requesting all information on Shelby be given to the U.S. Marshals Task Force. Numerous leads were established in the Eugene area.

5. On November 3, 1994, I received information from George Kim, a Special Agent with the Bureau of Alcohol, Tobacco and Firearms (AFT). Agent Kim had received information from a Confidential Reliable Informant (CRI) regarding the fugitive, Alan Shelby. This CRI has given very reliable information to the AFT in the past, including information that led to the arrest of a fugitive felon. The CRI stated that the CRI had seen a person believed to be Alan Shelby at a residence located at: 23170 S.E. Bohna Park Rd; Boring, Oregon. The CRI also overheard "Alan" make a statement approximating the following: "I had to knock out a guard". At the time the statements were made, the CRI thought nothing about it. The next day, the CRI read an article describing the escape, and relayed the information to Agent Kim.

6. Agent Kim then took the CRI out near the house which is located on the Clackamas County line in Boring, Oregon. Agent Kim and the CRI saw a man

who they believed to be Alan Shelby, outside the residence washing a car. Agent Kim described the man they saw was very similar to the photograph of Alan Shelby. The CRI also stated that this man was the same person the CRI had seen previously at the residence. Agent Kim said this person was very clean cut and wearing what appeared to be a blue jumpsuit or coveralls.

7. I then drove out to this residence with other Deputy U.S. Marshals. The residence is located in a rural area on about 10 acres of property. I was able to view the residence from a nursery approximately 1000 yards away. The residence appears to be a light colored tan brick single family house with a circular driveway. There are numerous outbuildings which include at least 2 travel trailers, a large blue shed, and a smaller green shed. I saw a man come out of the house wearing what appeared to be dark blue sweats, and very clean cut. From the distance, I couldn't make a positive I.D. but I believe it was the same person described by agent Kim.

8. The CRI stated that the person who resides at 23170 S.E. Bohna Park Rd. is known as Angel or Havannah. A PGE power check lists the subscribers as Hernan Rios and Cynthia Rios. I also received information from DMV that Angel Rios has an Oregon Drivers License under the name Angel Estrada.

9. The latest description information from law enforcement sources describe Alan Lawrence Shelby as a white male, date of birth of 03-23-66, 5 feet, nine inches tall, 160 pounds, with blue eyes and brown hair.

10. Based on this information, I believe Alan Shelby is currently hiding at the residence at: 23170 S.E. Bohna Park Rd. Boring, Oregon. I also believe Alan Shelby is an extreme danger to law enforcement officers and thereby request the court grant a no-knock warrant exception. I also request that the court grant permission for night time service on this warrant.

11. Based on this information, I request the permission for a search warrant on the residence located at 23170 S.E. Bohna Park Rd. for the body of Alan Lawrence Shelby.

10. Shelby is currently the subject of an arrest warrant in this district for the federal charge of Escape in violation of 18 U.S.C. Section 751 arising out of the incident described above.

11. Because this application involves information given by a Confidential Informant, I respectfully request that the Court keep this document sealed until the Court grants its disclosure at the appropriate time.

Subscribed and sworn before me
this 4 day of November, 1994.

/s/ WAYNE KAUFFMANN
WAYNE KAUFFMANN
Deputy U.S. Marshal

/s/ DONALD C. ASHMANSKAS
DONALD C. ASHMANSKAS
U.S. Magistrate

APPENDIX D

[Defense Counsel's name and address omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Cr. No. 94-379-HA

UNITED STATES OF AMERICA, PLAINTIFF

v.

HERNAN RAMIREZ, DEFENDANT

STIPULATION OF FACTS FOR MOTION TO SUPPRESS ON GROUNDS OF ILLEGAL EXECUTION OF SEARCH WARRANT

With respect only to the defendant's argument that evidence should be suppressed because the warrant was executed in violation of the Fourth Amendment and the federal no-knock statute,[1] the United States of America, through Assistant United States Attorney Stephen F. Peifer, and Hernan Ramirez, through his attorney, Michael R. Levine, hereby stipulate to the following facts:

---

[1] This stipulation is not relevant to defendant's argument that the evidence should be suppressed on the grounds that there was no probable cause to search to the defendant's home for Mr. Shelby. To decide that question, the Court must look only to the facts set forth in the affidavit to the warrant.

In the pre-dawn hours of Saturday, November 5, 1994, Hernan Ramirez, his wife Cynthia, and his three-year-old son Christopher were asleep in the residence at 23170 Bohna Park Road in rural Boring, Oregon. The residence has three bedrooms (including a master bedroom), a living room, kitchen, and an attached garage. A diagram of the property is attached as Exhibit A. This property covers several acres and includes, in addition to the residence, (1) a large work shop building, located about 195 feet south of the main residence (Diagram "E" in Exhibit A); (2) a large travel trailer located about 75 feet west of the workshop (Diagram "F"); (3) a small utility trailer, located about 75 feet from the southwest corner of the residence (Diagram "D"); and (4) a small travel trailer, located immediately adjacent to the east side of the garage (Diagram "C").

At about 6:15 a.m., about 45 armed law enforcement officers converged on the property to execute a federal search warrant for the person of one Alan Lawrence Shelby. A federal and state fugitive, Shelby had slipped from his handcuffs and struck a deputy sheriff to escape while en route to testify on an associate's behalf in Tillamook County. Shelby had a history of escapes, violent conduct, and criminal convictions and had vowed that he would not serve time in a federal prison. Agents obtained information from a person termed a confidential, reliable informant, that indicated that Shelby had been present on the defendant's property. (Further facts contained in the search warrant affidavit, attached to defendant's memorandum in support of his motion to suppress are hereby incorporated into this stipulation). Other information from the same informant indicated that the defendant was possibly involved in drugs, which he kept in the

garage. The informant also indicated there were supposed to be several guns in the garage.

The U.S. Marshal sought authorization from the issuing magistrate to serve the search warrant for Shelby at night and do so without compliance with the knock-and-announce requirement set forth in 18 U.S.C. § 3109. The Marshall prepared the warrant with the appropriate language, and the Magistrate signed it.

Special "SWAT" teams of state, county, and city officers surrounded the property. The Portland Police SWAT team was responsible for clearing and securing the large work shop building, the large travel trailer, and the small utility trailer. The Clackamas County Sheriff's SWAT Team would be responsible for securing the garage area of the residence through the East side window and for securing the travel trailer on the east side of the driveway immediately adjacent to the two car garage (Diagram "C").

Officers Lowe, McCuiston, and Thackson entered the unlocked and empty travel trailer in the driveway. While this was occurring, members of the Portland State SERT team passed the location of the travel trailer to other parts of the property.

Thereafter, Deputy Barnum of the Portland Police broke out the glass of the garage window. While he did so, Sergeant VeraCruz shouted several times, "Sheriff's Office, Search Warrant," at the window. VeraCruz then began to "gunport" the window, that is, aiming and moving his gun through the window ready to shoot if necessary, but he had trouble when the window's curtain got in his way.

At about the same time as this activity at the garage window, an Oregon State Police officer was

talking through a portable loud speaker system located at the front of the house. Sergeant Lowe, while at the garage window, was unable to hear what was being announced by the OSP officer because of VeraCruz's yelling. OSP Lieutenant Geistwhite, however, who was present in front of the house next to Detective Lockwood as Lockwood announced over the loudspeaker:

> State Police—search warrant. Attention inside 23170 SE Bohna Park. This is the State Police. All occupants inside 23170 SE Bohna Park, you are instructed to come out the front door now. Do not resist. Have hands on heads. You will not be harmed.

Inside the residence, Mr. Ramirez and his wife were awakened by outside noises. Neither could determine what the noises were. Mr. Ramirez then heard the breaking of glass, and he and his wife thought they were being burglarized. Both he and his wife feared for their safety and that of their child who had awakened and was crying. After hearing the glass breaking, Mr. Ramirez ran to the laundry room closet, obtained a pistol, and ran to the entrance of the garage area. In a state of panic, Mr. Ramirez fired toward the ceiling in an effort to scare away the intruders. A fragment of metal struck Veracruz in the face causing a slight wound.

The law enforcement officers returned fire and simultaneously shouted "police, police." Realizing, for the first time, that law enforcement officers were outside and trying to enter his residence, Mr. Ramirez ran to the living room, threw away the firearm across the floor, and threw himself on the floor in a prone position, shaking from fright. Mr.

Ramirez states that had he known that the police were trying to enter his home, he never would have fired the weapon. Ultimately, Mr. Ramirez and his wife, who was carrying their child in her arms, walked out of the house and into police custody. Despite a thorough search of the property, the officers did not find Shelby on the premises.

About 6:35 a.m., ATF Agent George Kim interviewed Mr. Ramirez. After advice and waiver of *Miranda* rights, Mr. Ramirez admitted he had fired the weapon, that he owned the gun he used as well as another one in the house, and that he was a convicted felon. He said that he had been awakened by noises outside his house and heard the sound of breaking glass. He said he shot up in the air to scare away people he thought were trying to burglarize his home. Because they were asleep, Mr. Ramirez said, neither he nor his wife had heard any announcement of identity by the officers. Shown a picture of Shelby, Mr. Ramirez said that a man with that appearance might have been present on the property two days earlier.

Mrs. Ramirez also said that she did not know that the police were trying to enter her home and that she believed she was being burglarized and/or attacked by intruders.

Agent Kim used the information furnished by Mr. Ramirez, along with a searching officer's observation of the gun on the living room floor, to obtain another search warrant (attached to the government's memorandum in opposition to defendant's motion to suppress, and hereby incorporated into this stipulation). Executing the second warrant, agents reentered the house later the same day and retrieved

the pistol on the living room floor and a second one in a box as Mr. Ramirez had described.

SO STIPULATED BY THE PARTIES:

/s/ MICHAEL R. LEVINE
MICHAEL R. LEVINE
Attorney for Mr. Ramirez

/s/ _____
A.U.S.A. STEPHEN F. PEIFER
for the Government

DATED: April 20, 1995 DATED: 1/20/95

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-30158
D.C. No. CR-94-00379-1-ALH

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

HERNAN RAMIREZ, DEFENDANT-APPELLEE

[Filed: Nov. 15, 1996]

ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC

Before: REINHARDT, KOZINSKI, and FERNANDEZ, Circuit Judges.

The panel has voted to deny the appellant's petition for rehearing and to reject the suggestion for rehearing en banc. Judge Kozinski would grant the petition for rehearing and accept the suggestion for rehearing en banc. Judge Kozinski's dissent is amended to delete the penultimate sentence.

The suggestion for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.